



No. 7721

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IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAMES S. McKNIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE

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CITATIONS AND AUTHORITIES

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In view of the fact that counsel for the appellant has waived the alleged errors embraced in propositions 1 and 2, found on pages 13 and 14 of his brief, as well all assignments of error supporting these two propositions, the first of which dealt with the failure of the Court to give certain instructions mentioned in the first assignment of error, and the other assignment dealing with the statement of the Court with reference to the entry of a plea of nolo contendere, attention will only be given in this brief to the third assignment of error, on page 16 of appellant's brief, which discusses the question of whether or not the two postal cards in question violate Section 335, Title 18, *U.S.C.A.*

The writing by which these two assignments of error are waived is on file in the office of the Clerk of this Court, signed by attorney for appellant.

Section 335 of Title 18, *U.S.C.A.*, declares non-mailable “any postal card upon which any delineations, epithets, terms or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another.”

In this case the postal cards introduced in evidence, and which testimony showed the defendant either mailed or caused to be mailed, are set out in appellant’s brief on pages 2 and 3, respectively, but attention of the Court is called to the fact that the postcard set out on page 3 of appellant’s brief, which said card has been certified by the Clerk of the District Court to this Honorable Court, has upon the margin thereof a drawing showing a man being kicked down the stairway of a building represented to be the University of California at Los Angeles, and in one hand of this person being kicked out is a bag or sack which has printed signs and numerals representing \$126,000.

Appellant in his brief on page 3 makes the statement that in the first count Overt Act No. 8 only alleges the printing of this card for mailing. An inspection of the indictment will reveal that Overt Act No. 8, on page 4 of the indictment, states: “Said defendants deposited and caused to be deposited in the United States mails, within the City of Los Angeles, one of said postal cards mentioned in Overt Act No. 1 hereof.”

“Whether or not the matter is scurrilous, defamatory or calculated by the terms or manner or style of display and obviously intended to reflect injuri-

ously upon the character or conduct of another is a question of fact for the jury.”

U. S. v. Dodge, Dist. Ct. Pennsylvania, 1895, 70 Fed. 235.

“Whether a writing is scurrilous when used on a postal within the meaning of the statute is properly a question for the jury.”

U. S. vs. Olney, Dist. Ct. Tenn. 1889, 38 Fed. 328.

“It is a question of fact for the jury whether the display of certain words upon an envelope would support an indictment.”

U. S. v. Brown, Cir. Ct. Vermont 1890, 43 Fed. 135.

“When the language of a writing or letter is capable of two constructions or meanings, one within and the other without the statute, it may be for the jury to say whether or not it offends against the statute and is non-mailable.”

U. S. v. Davidson, 244 Fed. 533.

“The obnoxious character of the writing is a question of fact for the jury and not of law for the court.”

U. S. v. Davis, 38 Fed. 327.

In the cases cited in appellant’s brief, they have to do with language on the envelope of letters, which language in itself does not convey any meaning calculated to reflect injuriously upon the character of another. As an illustration, in the *Davidson* case, cited by appellant,

244 Fed. 523, it was a sealed letter on the envelope of which was the word "Pros." and the court in that case said:

"The injurious and slanderous meaning concealed from the general public and unknown to it, and only known to the writer and recipient of the envelope and enclosed communication, could not bring the case within the statute."

And in the case of *U. S. c. Davis*, 59 Fed. 357, cited by appellant, the word "notorious" appeared on the envelope and the court properly held that this in itself was not within the statute.

In the instant case the conclusion seems inevitable that these postal cards sent through the mails, bearing as they did a statement that Cunningham was guilty of gross mismanagement of finances at the University, accompanied by the drawing showing Cunningham being booted down the stairway of said University with a sack or bag representing \$126,000 in his hand, is defamatory and tends to and is calculated by its very language and delineation to reflect injuriously upon the character of Cunningham and to convey to the mind of the recipient of such postal card the idea that Cunningham was not only guilty of gross mismanagement, but was guilty of theft of the money of the University.

It is inconceivable that any other conclusion might be reached by the recipient of one of these cards bearing

the words and the drawing thereon, and it is respectfully submitted that the postcards are clearly within the statute and that the judgment of the lower court should be affirmed.

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